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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JESUS CHICAS, Defendant and Appellant.	B219661 (Los Angeles County Super. Ct. No. BA357424)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lance A. Ito, Judge. Affirmed as modified.

Tanya Dellaca, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Yun K. Lee and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Jesus Chicas appeals from the judgment entered following his conviction by jury on one count of driving under the influence and one count of driving with a blood alcohol percentage of 0.08 or higher. (Veh. Code, § 23152, subds. (a) & (b).) Appellant was sentenced to a term of three years as to the first count and a concurrent term of two years as to the second count.

Appellant raises two contentions on appeal. First, appellant contends that the trial court erred in failing to stay his sentence on the second count pursuant to Penal Code section 654. Second, appellant contends that he is entitled to additional presentence conduct credits pursuant to the amendment to Penal Code section 4019, which became effective January 25, 2010. We agree that the trial court erred in failing to stay his sentence pursuant to Penal Code section 654 and therefore direct the superior court to modify the abstract of judgment to reflect the stay. We affirm in all other respects.

FACTUAL AND PROCEDURAL SUMMARY

On June 7, 2009, around 3:00 p.m., Jesus Vega was driving eastbound on Gage Avenue. Appellant was driving westbound on Gage, waiting in the left turn lane to make a left turn at the intersection with Broadway. Appellant turned in front of Vega as Vega approached the intersection with Broadway. Vega stepped on his brakes, but he was unable to stop in time, so he hit appellant's car on the passenger side.

Vega pulled his car over, but appellant continued driving south on Broadway until someone used their car to block him from driving away, about 45 meters down Broadway. Vega got out of his car and ran toward appellant and asked a witness to call the police. Appellant told Vega not to call the police because appellant would run into problems. Appellant appeared drunk to Vega.

Los Angeles Police Department Officers Ernest Berry and Oganes Ovsepian arrived around 3:50 p.m. Officer Berry noticed that appellant had poor balance and smelled from alcohol; his eyes were watery, and his face was flushed. Berry, who is

bilingual in Spanish, testified that appellant "cussed me out in Spanish, saying that, 'you are not going to arrest me.'" Berry attempted to handcuff appellant, but he pulled away from the handcuffs. Berry and Ovsepian then held appellant's arms and handcuffed him.

Berry asked appellant if he had been drinking, and appellant replied that his last drink was two hours before the accident. Berry and Ovsepian saw two 40-ounce bottles of beer on the floor of the passenger side of appellant's car; one of the bottles was empty and the other was nearly empty.

The officers did not conduct a field sobriety test after appellant became combative because it required removing appellant's handcuffs, which the officers felt would have been unsafe. After arriving at the police station, the officers conducted sobriety tests on appellant that indicated he was impaired by alcohol. A breathalyzer test administered around 5:30 p.m. indicated appellant's blood alcohol percentage to be 0.22.

Appellant was charged by information with driving under the influence (Veh. Code, § 23152, subd. (a)) and driving with a blood alcohol percentage of 0.08 or higher (Veh. Code, § 23152, subd. (b)). Appellant entered not guilty pleas, declined the plea offer of two years, and proceeded to a jury trial, at which the above testimony was presented. Appellant did not present any evidence at trial.

The jury found appellant guilty of both counts and found true the allegation that appellant's blood alcohol percentage was 0.15 or more within the meaning of Vehicle Code section 23578. The court sentenced appellant to the upper term of three years as to count one and the midterm of two years as to count two, to be served concurrently. Appellant received credit for 117 days actual custody and 58 days good time/work time, for a total of 175 days of credit. Appellant filed a timely notice of appeal.

DISCUSSION

Appellant contends that his sentence on the second count should have been stayed pursuant to Penal Code section 654, which prohibits "'[p]unishment for two offenses

arising from the same act . . . .' [Citation.]" (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) Respondent agrees that the sentence on count two should have been stayed.

Appellant's second contention is that he is entitled to additional custody credits pursuant to the amendment to Penal Code section 4019. We reject appellant's contention that the amendment applies retroactively.

I. Penal Code Section 654

Section 654 provides in relevant part that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (Pen. Code, § 654, subd. (a).)

"'[S]ection 654 applies not only where there was but one act in the ordinary sense, but also where there was a course of conduct which violated more than one statute but nevertheless constituted an indivisible transaction. . . . If all the offenses were *incident to one objective*, the defendant may be punished for any *one* of such offenses but not for more than one.' [Citation.]" (*People v. Wynn* (2010) 184 Cal.App.4th 1210, 1214-1215.)

Appellant contends that his sentence on count two should have been stayed because he harbored a single intent when he committed the offenses and the offenses were part of an indivisible course of conduct. There is no question that appellant's sentence on count two should have been stayed, and respondent concedes the issue. (*People v. Subramani* (1985) 173 Cal.App.3d 1106, 1111; *People v. Lewis* (1983) 148 Cal.App.3d 614, 620.)

We decline appellant's request that we remand the matter and amend the judgment in order to prevent the use of the conviction on count two for penal or administrative purposes, such as to suspend his license or in the event of recidivism, because the use of that conviction in any future proceeding will depend on the laws in effect at that time. (See *People v. Benson* (1998) 18 Cal.4th 24, 29 ["[E]ven when multiple punishment for separate offenses has been barred under section 654 in an earlier proceeding, the

Legislature is free to authorize the designation of such prior felony convictions as separate priors for purposes of determining the appropriate sentence following a subsequent conviction."].)

II. Penal Code Section 4019

Appellant contends that he is entitled to additional custody credits pursuant to the amendment to Penal Code section 4019. We reject appellant's argument that the amendment to section 4019 should apply retroactively.

Penal Code section 4019, subdivisions (b) and (c) provides that a criminal defendant may earn additional presentence conduct credit for performing assigned labor and complying with the penal institution's rules and regulations. In 2009, the Legislature passed Senate Bill No. 3X 18, which, among other things, amended subdivisions (b) and (c) of section 4019 to provide for the accrual of presentence credit at twice the previous rate, with certain exceptions. (See Pen. Code, § 4019, subds. (b) & (c), as amended by Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 28, § 50.) Appellant contends that he is entitled to additional conduct credits because the amendment to Penal Code section 4019 should apply retroactively. California courts are divided on whether the amendment applies retroactively or prospectively.[1] We conclude that it does not apply retroactively and that appellant is not entitled to additional custody credits based on the amendment.

Section 3 of the Penal Code provides: "No part [of the Penal Code] is retroactive,

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[1] The California Supreme Court has granted review in cases that address the issue, including our decision in *People v. Eusebio* (2010) 185 Cal.App.4th 990 (2d Dist., Div. Four), review granted September 22, 2010, S184957. (See also, e.g., *People v. Landon* (2010) 183 Cal.App.4th 1096 (1st Dist., Div. Two), review granted June 23, 2010, S182808; *People v. House* (2010) 183 Cal.App.4th 1049 (2d Dist., Div. One), review granted June 23, 2010, S182813; *People v. Brown* (2010) 182 Cal.App.4th 1354 (3d Dist.), review granted June 9, 2010, S181963; *People v. Otubuah* (2010) 184 Cal.App.4th 422, review granted July 21, 2010, S184314; *People v. Rodriguez* (2010) 182 Cal.App.4th 535 (5th Dist.), review granted June 9, 2010, S181808.)

unless expressly so declared." Thus, "'[a] new statute is generally presumed to operate prospectively absent an express declaration of retroactivity or a clear and compelling implication that the Legislature intended otherwise. [Citation.]' [Citation.]" (*People v. Alford* (2007) 42 Cal.4th 749, 753.) "To ascertain whether a statute should be applied retroactively, legislative intent is the 'paramount' consideration . . . ." (*People v. Nasalga* (1996) 12 Cal.4th 784, 792.)

Where, as here, there is no express statement of legislative intent, we look to other factors to determine legislative intent. (*In re Estrada* (1965) 63 Cal.2d 740, 744.) *In re Estrada* addressed an amendment reducing the penalty for escape. The court held that the amendment applied retroactively, reasoning that "[w]hen the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act." (*Id.* at p. 745.) We believe, however, that increasing the rate at which credits are accrued does not represent a legislative determination that a prior punishment was too severe.

We note that, elsewhere in Senate Bill No. 3X 18, the Legislature expressly provided for limited retroactive application of enhanced conduct credits for prison inmates who have completed training as firefighters after July 1, 2009. (See Pen. Code, § 2933.3, as amended by Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 28, § 41.) The Legislature thus demonstrated that it could, if it wished, provide for the amendment to section 4019 to have retroactive effect. Its failure to do so gives rise to the inference that it did not so intend.

Appellant also contends that denial of retroactive application of the amendment to section 4019 would violate his right to equal protection under the equal protection clause of the federal Constitution. (See U.S. Const., 14th Amend.) He relies on *In re Kapperman* (1974) 11 Cal.3d 542 (*Kapperman*), in which the court reviewed a provision that made custody credit prospective, applying only to persons delivered to the Department of Corrections after the effective date of the legislation. The court concluded

that this limitation violated equal protection, and extended the benefits retroactively to those improperly excluded by the Legislature. (*Id.* at p. 545.)

Appellant also cites *People v. Sage* (1980) 26 Cal.3d 498 (*Sage*), where the Supreme Court considered a previous version of section 4019 which denied presentence conduct credit to a detainee eventually sentenced to prison, although credit was given to detainees sentenced to jail and to felons who served no presentence time. The court found no rational basis, nor compelling state interest, to deny presentence conduct credit to detainee/felons. (*Id.* at p. 508.) We find both *Kapperman* and *Sage* distinguishable.

Kapperman addressed actual custody credits, not conduct credits. Conduct credits must be earned by a defendant, whereas custody credits are constitutionally required and awarded automatically on the basis of time served. *Sage* is distinguishable because the purported equal protection violation appellant alleges here is temporal, rather than based on his status as a misdemeanant or felon. The fact that a defendant's conduct cannot be influenced retroactively provides a rational basis for the Legislature's implicit intent that the amendment only apply prospectively. Finding no clear and compelling implication that the Legislature intended the amendment to apply retroactively, we conclude that the amendment applies prospectively and reject appellant's claim.

DISPOSITION

We direct the clerk of the superior court to amend the abstract of judgment to reflect that the sentence on count two is stayed pursuant to Penal Code section 654 and to forward a copy of the amended abstract to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

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SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.